

**BEFORE THE
UNITED STATES TRADE REPRESENTATIVE**

IN THE MATTER OF:

Certain Steel

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Investigation No. TA-201-73

WRITTEN RESPONSE BRIEF OF

TUBAC S.A.

REGARDING

WELDED NON-OCTG AND EXCLUSION UNDER CBERA

**POTENTIAL ACTION UNDER SECTION 203 OF THE TRADE ACT OF 1974 WITH
REGARD TO IMPORTS OF CERTAIN STEEL**

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TUBAC S.A.: USTR REMEDY BRIEF

I. INTRODUCTION

Tubac S.A. (“Tubac”) respectfully submits the following brief with respect to the Presidential phase of the Steel Section 201 action. Tubac’s arguments pertain to welded non-OCTG, which was investigated by the U.S. International Trade Commission (“Commission”) and for which the Commission made injury findings and issued remedy recommendations.

Tubac respectfully submits that the President cannot include Guatemalan imports of welded non-OCTG because Guatemala is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA), which entitles it to preferential consideration by the President. In accordance with the statute, the President cannot exclude imports from CBERA beneficiary countries because the Commission did not find these imports to be a substantial cause of the serious injury to the domestic industry. Moreover, the exclusion of these imports on a non-MFN basis has been authorized by a specific waiver granted to the United States by WTO members pursuant to Article XXV of the General Agreement on Tariffs and Trade. Therefore, the United States cannot be challenged by non-CBERA developing countries at the WTO level if it determines to exclude CBERA countries but not to exclude other developing countries.

II. THE PRESIDENT MUST EXCLUDE GUATEMALAN IMPORTS OF WELDED NON-OCTG FROM ANY REMEDY HE IMPOSES

A. The Statute Requires The Exclusion Of CBERA Beneficiary Imports Unless The Commission Determines That These Imports Are A Substantial Cause Of Serious Injury

Under the statute, the President may only suspend the duty-free treatment of imports under the CBERA if the Commission determines that such duty free importation was a “substantial cause” of the serious injury to the domestic industry. 19 U.S.C. § 2703(e)(4) provides:

No proclamation which provides solely for a suspension referred to in paragraph (3) of this subsection with respect to any article shall be taken under section 203 of the Trade Act of 1974 (19 U.S.C. 2253) unless the United States International Trade Commission, in addition to making an affirmative determination with respect to such article under section 202(b) of the Trade Act of 1974 (19 U.S.C. 2252(b)), determines in the course of its investigation under such section that the serious injury (or threat thereof) substantially caused by imports to the domestic industry producing a like or directly competitive article results from the duty-free treatment provided by this chapter.

Absent the Commission finding required by the statute, the President must exclude CBERA countries from any section 201 remedy.

B. In This Case, The Commission Recommended That The President Exclude CBERA Imports

In this case, the Commission has recommended to the President that he exclude from any remedy the imports of CBERA beneficiary countries. The Commission majority stated:

The Commission further recommends that none of the additional tariffs or tariff-rate quotas apply to imports from Israel, or to any imports entered duty-free from beneficiary countries under the

Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act.¹

Additionally, two of the three Commissioners that did not join the majority remedy recommendations also recommended that the President exclude CBERA countries from any remedy on welded non-OCTG. Thus, five of the six Commissioners in this investigation recommended that the President not include CBERA beneficiary countries in any remedy on welded non-OCTG steel.

The Commission stated in its opinion that imports of steel from CBERA beneficiary countries during the POI were “small and sporadic.” Imports of welded tubular products from CBERA beneficiary countries did not exceed 0.35% in any of the years between 1996 and 2000.² Imports of all tubular products on which the Commission made an affirmative injury determination or was evenly divided from CBERA beneficiary countries did not exceed 0.03% in any of the years between 1996 and 2000.³ If the determination is based on imports of all products on which the Commission made an affirmative injury determination or was evenly divided, imports from CBERA beneficiary countries did not exceed 0.06% in any of the years between 1996 and 2000.⁴ In fact, imports from CBERA beneficiary countries of virtually all of the products on

¹ Determination and Views of the Commission, *Steel*, Inv. No. TA-201-73, USITC Pub. No. 3479 (December 2001) at 8 (“Commission Opinion”).

² Commission Report (public) at Table E-2, Import data from ITC DATAWEB.

³ *See id.*

⁴ *See id.*

which the Commission made an affirmative injury determination or was evenly divided are well below 0.5% and most are less than 0.1%.⁵

By recommending the exclusion of CBERA imports from the remedy, the Commission did not issue a finding that the serious injury to the domestic industry was substantially caused by CBERA duty-free imports. Therefore, the statute prohibits the President from suspending the duty-free treatment of CBERA beneficiary country imports.

C. The WTO CBERA Waiver Authorizes The United States To Exclude CBERA Beneficiary Countries On A Non-MFN Basis

Under the Article XXV waiver obtained by the United States from WTO members, the President may determine to exclude CBERA beneficiary countries from the safeguard remedy, but not to exclude other developing countries. Although Tubac takes the position that Article 9.1 of the WTO Agreement on Safeguards requires all qualifying developing country WTO members be excluded from any remedy in the present safeguard action, if the President chose to only exclude CBERA beneficiary countries, such action would not be inconsistent with the United States international obligations under Article 9.1 (developing country exclusion) of the Agreement on Safeguards, Article 2.2 of the Agreement on Safeguards (MFN requirement for safeguards) or Article I (GATT MFN principle) of the General Agreement on Tariffs and Trade (GATT).

Irrespective of any the other GATT and/or Safeguards Agreement provisions, Article XXV(5) of the GATT allows the waiver of any obligation of a contracting party by a two-thirds

⁵ See *id.* The exceptions are Rebar in interim 2001, in which the percentage of U.S. imports from CBERA beneficiary countries was 1.20%, and stainless bar in 1997 in which the percentage of U.S. imports from CBERA beneficiary countries was 1.45%

majority vote of the General Council. In 1979, the United States requested a ten-year waiver of Article I(1) (*i.e.*, MFN treatment) of the GATT with respect to its treatment of beneficiary countries under the Caribbean Basin Initiative (CBI). In 1995, the United States requested a renewal of this waiver with respect to its treatment of beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA). The General Council adopted this waiver on November 15, 1995, stating:

Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the GATT 1994 shall be waived until 31 December 2005, to the extent necessary to permit the United States Government to provide duty-free treatment to eligible products of the Caribbean Basin countries as authorized by the provisions of CBERA as amended, up to the date of this Decision, without being required to extend the same duty-free treatment to like products of any other Member.⁶

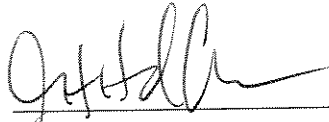
Thus, the United States has a waiver of its MFN obligations with respect to the CBERA beneficiary countries. Therefore, there is no potential challenge to the exclusion of CBERA beneficiary countries as a violation of Article 9.1 or Article 2.2 of the Agreement on Safeguards, or Article I of the GATT.

⁶ See *Caribbean Basin Recovery Act*, Renewal of Waiver, Decision of 15 November 1995, WT/L/104, (24 November 1995) (attached as Exhibit 1).

III. CONCLUSION

Based on the foregoing, Tubac respectfully submits that the President must exclude Guatemalan imports of welded non-OCTG from any remedy because Guatemala is a beneficiary country under the Caribbean Basin Economic Recovery Act (CBERA), which entitles it to preferential consideration by the President. Moreover, Tubac asserts that this action would be consistent with the WTO obligations of the United States.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Spak', written over a horizontal line.

Walter J. Spak
Lyle B. Vander Schaaf
Joseph H. Heckendorn

White & Case LLP
Counsel to Tubac S.A.

EXHIBIT 1

WORLD TRADE
ORGANIZATION

WT/L/104
24 November 1995

(95-3674)

CARIBBEAN BASIN ECONOMIC RECOVERY ACT

Renewal of Waiver

Decision of 15 November 1995⁷

Taking note of the request of the Government of the United States for a renewal of the waiver from its obligations under paragraph 1 of Article I of the General Agreement which was granted by the CONTRACTING PARTIES of the GATT 1947 on 15 February 1985 for the period from 1 January 1984 until 30 September 1995, for provision of duty-free treatment for imports of eligible products originating in beneficiary Caribbean countries and territories as provided for in the Caribbean Basin Economic Recovery Act (hereinafter referred to as "CBERA");

Bearing in mind the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries and the 1994 Decision on Measures in Favour of Least-Developed Countries;

Considering the exceptional situation of the developing countries and territories of the Caribbean Basin, and the stated objective of CBERA to assist the trade and economic development of beneficiary developing countries and territories situated in the Caribbean Basin by encouraging the expansion of productive capacity in response to more liberal access and to new trading opportunities for Caribbean countries and territories;

⁷ Adopted in accordance with the Procedures on WTO Decision-Making under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93).

Considering also that the duty-free treatment provided under CBERA is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the GATT 1994 and with the trade, financial and development needs of the beneficiary countries and territories, and not to raise barriers or to create difficulties for trade of other Members;

Considering, moreover, that the duty-free treatment provided under CBERA should not prejudice the interests of other Members not benefitting from such treatment, and that it is expected that the extension of such duty-free treatment will not cause a significant diversion of United States imports of products eligible under CBERA originating in Members who are not beneficiary countries;

Having regard to the assurances that the United States Government does not envisage any action in pursuance of CBERA which might cause adverse effects on the sugar trade of Members who are not beneficiary countries;

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Considering that the duty-free treatment provided under CBERA by the United States Government shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

Considering, furthermore, that the duty-free treatment provided under CBERA by the United States Government shall not adversely affect the maintenance, operation and improvement of the United States' Generalized System of Preferences;

Noting, furthermore, the assurances given by the United States Government that it will, upon request, promptly enter into consultations with any interested Member with respect to any difficulty or matter that may arise as a result of the implementation of the trade-related provisions of CBERA;

Having regard to the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956, the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, and paragraphs 3 and 4 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "WTO Agreement");

Members, acting pursuant to the provisions of paragraph 3 of Article IX of the WTO Agreement,

Decide that:

1. Subject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the GATT 1994 shall be waived until 31 December 2005, to the extent necessary to permit the United States Government to provide duty-free treatment to eligible products of the Caribbean Basin countries as authorized by the provisions of CBERA as amended, up to the date of this Decision, without being required to extend the same duty-free treatment to like products of any other Member.

2. Such duty-free treatment shall be designed not to raise barriers or create undue difficulties for the trade of other Members. This Decision in no way affects the obligation of the Government of the United States to administer its tariff rate quotas applied to sugar imports in a manner consistent with Article XIII of the GATT 1994.

3. The Government of the United States will submit to the General Council an annual report on the implementation of the trade-related provisions of the CBERA with a view to facilitating the annual review provided for in paragraph 4 of Article IX of the WTO Agreement. The United States Government shall promptly notify the General Council of any trade-related measure taken under CBERA, in particular, any changes in the designation of beneficiary countries, as well as any modification being considered in the list of eligible products and the duty-free treatment thereof, and shall furnish them with all the information they may deem appropriate relating to such action. The United States Government shall consult with regard to any modification being considered in the list of eligible products.

4. The United States Government will, upon request, promptly enter into consultations with any interested Member with respect to any difficulty or matter that may arise as a result of the implementation of the trade-related provisions of CBERA; where a Member considers that any benefit accruing to it under the GATT 1994 may be or is being impaired unduly as a result of such implementation, such consultation shall examine the possibility of action for a satisfactory adjustment of the matter. This Decision does not affect Members' rights as set forth in the Understanding in Respect of Waivers of Obligations under the GATT 1994.